STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the order denying leave in the Court of Appeals
Hon. Harold Hood, P.J., Brian K Zahra, Kirsten F. Kelly, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

S CT No 122364

GLENN GOLDSTON,
Defendant-Appellee.

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Wayne Circuit Court No. 01-011229
Court. of Appeals No. 241605

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# DEFENDANT-APPELLEE'S BRIEF ON APPEAL
# ORAL ARGUMENT REQUESTED

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## COUNTER STATEMENT OF QUESTION PRESENTED

ARGUMENT

I

TO ASSURE ALL CITIZENS THEIR STATE CONSTITUTIONAL RIGHT AND US FOURTH AMENDMENT RIGHT TO BE FREE OF ILLEGAL SEARCHES THE COURTS CREATED THE EXCLUSIONARY RULE. DO PEOPLE NEED THIS JUDICIAL REMEDY TO BE FREE FROM SEARCHES BY A SOVEREIGN THAT DESPITE THREE LEVELS OF REVIEW CANNOT ISSUE A VALID SEARCH WARRANT?

The Defendant-Appellee answers: "Yes."

The Plaintiff-Appellant answers: "No."

## SUMMARY OF ARGUMENT

The police, on an unknown day, did not arrest Mr. Goldston who was standing on a street corner, but took from him his firefighter jacket, helmet and boots and $238.33 which he had collected 'to help the firemen in New York'. The police then prepared an affidavit and warrant asking to search an address in Inkster and to search that address for, among other things, 'bank accounts, currency and any and all other illegal contraband.' The search warrant and affidavit did not indicate that the address is Mr. Goldston's or why the police believed bank account, currency and 'any and all other illegal contraband' would be found at that address or had anything to do with the man standing on the corner, Mr. Goldston.

The prosecutor and the judge approved the search warrant. The police entered the house, found contraband and Mr. Goldston was then arrested and charged with this case.

The police did not state probable cause for searching the address in Inkster and in fact did not have probable cause to search. If this court adopts the good faith exception to the exclusionary rule, the probable cause requirement of the Michigan Constitution will be rendered meaningless. The people of the state will no longer be secure in their houses from police searches.

## STATEMENT OF FACTS

The Defendant-Appellee Glenn Goldston, was charged in a four (4) count information with count one (1) possession of a firearm by a felon, count two (2) felony firearm during his possession of a firearm as a felon, count three (3) larceny by false personation less than $1,000 ( a one year misdemeanor), and count four (4) possession of marijuana ( a one year misdemeanor). In the same information Mr. Goldston was advised that if convicted he could be sentenced as an habitual third felon.

The incident that generated this case occurred sometime before September 24, 2001 when a police officer saw a man standing on a street corner collecting money 'to help the firemen in New York.' (6a).[1] The man was identified as Mr. Goldston and he was holding a fireman's boot and wore a t-shirt with FIREMAN on it but no department name. The man had (not was wearing) a firefighter's helmet and jacket. The man denied that he was a fireman. The police took from Mr. Goldston the 'money that was collected.' (6a). Mr. Goldston was not arrested at that point.

On September 24, 2001, the police, using the above facts requested a search warrant for '29440 Hazelwood, Inkster, MI, a single family house'. (5a). The police stated they were searching for:

> Police/Fire scanner(s) or radios, fire, EMS, Police equipment. Any and all emergency equipment, bank accounts, currency, donation type cans or containers, any and all other illegal contraband. (5a).

The police received approval from the Assistant Prosecuting Attorney, Lisa Raymond

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[1]There was no preliminary examination in this matter. The facts of the case are taken from the search warrant and the affidavit.

(Chief of the Out-County division) to submit the search warrant to Judge Sylvia James, who signed the search warrant.

The police executed the search warrant which resulted in these charges against Mr. Goldston.

Defense counsel filed a motion to suppress the fruit of the illegal search arguing that the police were not given permission to search the residence and the search warrant was invalid for it did not:

a. state probable cause to search the listed address contrary to **MCL** 780.654

b. state on what date the police observation was made

c. state why the affiant believed the 'contraband' would be located in 29440 Hazelwood, Inkster, MI.

d. state with specificity the items to be searched for since the police were given authority to seize 'all other illegal contraband.'

e. state with specificity the facts, that it was a 'bear bones' affidavit.

At the suppression hearing, the court summarized the issue raised by the defense as follows:

> 'The thrust of the motion which is that there is not a sufficient factual basis set forth in the affidavit purporting (sic) warrant to justify a reason why the warrant was issued, why it was necessary to search this residence, am I correct?' (13a).

Defense counsel responded: 'Why there was a justification to allow this intrusion in a person's residence.' (13a). The prosecutor responded that the affidavit established probable cause for issuance of a search warrant. (14a).

The judge found there was no date in the affidavit stating on what day Mr.

Goldston was seen standing on the corner and thus he could not tell if the observation was recent in relation to the request for the warrant. (17a). The judge stated that the affidavit should link the alleged wrong doing with the alleged items in the place to be search but the affidavit does not even indicate that the place to be searched has any connection with Mr. Goldston. (18a).

The judge made the following findings:

1. The observations of the police were not dated so the court could not determine if the warrant was requested on current or stale information.

2. Nothing in the affidavit connected Mr. Goldston to the address the police asked to search.

The judge ruled:

> 'So therefore based on those findings by the Court, I'm going to grant the motion. I don't think that the affidavit sufficiently established the probable cause necessary so that the magistrate could properly have issued the warrant. So the motion is granted.' (21a).

The court dismissed the three counts related to the illegal search and remanded the larceny by false pretenses, being a misdemeanor, to the district court.

The prosecutor's late application for leave to appeal was denied by the Court of Appeals on August 29, 2002. (3a). Leave was granted to the prosecutor by this Honorable Court on January 15, 2003 'limited to the issue whether this Court should adopt and apply in this case a "good faith" exception to the exclusionary rule.

## ARGUMENT

### I

### TO ASSURE ALL CITIZENS THEIR STATE CONSTITUTIONAL RIGHT AND US FOURTH AMENDMENT RIGHT TO BE FREE OF ILLEGAL SEARCHES THE COURTS CREATED THE EXCLUSIONARY RULE. PEOPLE NEED THIS JUDICIAL REMEDY TO BE FREE FROM SEARCHES BY A SOVEREIGN THAT DESPITE THREE LEVELS OF REVIEW CANNOT ISSUE A VALID SEARCH WARRANT.

The prosecutor plaintively argues that the police did nothing wrong and yet the evidence is suppressed. Why? Because the police investigator that wrote the search warrant and affidavit in support failed to state the date of the police contact with the fellow on the street and what relation some guy standing on a street corner asking for money had to do with an address in Inkster. Why? Because the prosecutor who's job it is to check the police work failed to notice that the affidavit did not include the date the man was standing on the corner nor a connection of the man on the corner with an address in Inkster. Why? Because the judge who's job it is to assess the validity of a search warrant and affidavit failed to notice if the information was current or stale and failed to observe there was no connection to the man on the corner with the address listed, and failed to observe that the police did not state why they believe they would find contraband at that address.

The defense asks why shouldn't the police the prosecutor and the judge be required to do their jobs and if they cannot why do they complain if they are not given the fruit of their illegal gains? It is clear from the facts of this case that the exclusionary rule is needed by the citizens of this state to protect them from illegal searches by their

sovereign.

The innocent and society are the principal beneficiaries of the exclusionary rule. Dworkin, **Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering**, 48 Ind.L.J. 329, 330-31 (1973).

A. General Background

The purpose of the exclusionary rule is both to deter the police and ensure judicial integrity. In **Elkins v. United States**, 364 U.S. 206 (1960), the Court described the purpose of the exclusionary rule "to deter - to compel respect for the constitutional guaranty in the only available way - by removing the incentive to disregard it." Id. at 217. A second justification for the exclusionary rule detailed in **Mapp v Ohio**, 367 U.S. 643 (1961) was "the imperative of judicial integrity." Id. at 659 (quoting **Elkins**, 364 U.S. at 222).

The Fourth Amendment is rooted in English common law, 'writs of assessment', and the general dislike of people of this country for the government's entry into their homes and businesses. The prosecutor cites to the case of **Entick v. Carrington**, 95 Eng. Rep. 807 (K.B. 1765) arguing that it was a civil case but indeed the issue was about a search of a residence. In **Paxton's Case**, Quincy's Reports 51-57 (1761), several Boston merchants denounced the writs of assessment and argued for a more just form of warrants, specifying homes to be searched and particular evidence to be seized. Id. Although the merchants lost the challenge, the arguments set forth by the merchants and colonists inspired resistance and formed a "mosaic of rebellion," leading to widespread interference with the execution of writs and signaling steps

toward an outcry for independence. Kris E. Palmer, **Constitutional Amendments: 1789 to the Present** 70, 73 (2000). The colonists' disdain for the writs of assistance was so immense, that, on the eve of the publication of the Declaration of Independence, "John Adams cited the broad British law enforcement powers as 'the commencement of the controversy between Great Britain and America.'" Id. at 68. [See generally Matthew A. Nelson, "**An appeal in good faith: Does the Leon good faith exception to the exclusionary rule apply in west Virginia?** Spring, 2003, West Virginia Law Review.

A search warrant may not be issued by a magistrate unless it is supported by probable cause, which is established by oath or affirmation. **US Const, Am IV**; **Const 1963, Art 1 Sec 11.**

Probable cause must exist whether a search is pursuant to a warrant or one of the exceptions to the warrant requirement. **People v White**, 392 Mich 404, 415 (1974), quoting **Chambers v Maroney**, 339 US 42; 90 SCt 1975 (1970). Probable cause is more than a generalized suspicion or hunch. **People v Burrell**, 417 Mich 439, 457 (1983). It must be an honest belief, based upon reasonable grounds that contraband, or evidence of a crime will be found at the listed location. That belief must be known at the time of the search. **People v Stewart**, 232 Mich 670 (1925) and **People v Anthony**, 120 Mich App 207, 211 (1982). Probable cause to search requires a "substantial basis" for the conclusion that there is a "fair probability" that contraband or evidence of a crime will be found in a particular place. **People v Russo**, 439 Mich 584, (1992), citing **Illinois v Gates**, 462 US 213, 103 SCt 2317 (1983).

Not only must probable cause to believe the search will produce evidence of a crime exist, that probable cause must not be stale or remote. The applicable test regarding the issue of remoteness depends on the facts and circumstances of the particular case. The inquiry is not just is there recent information to confirm that a crime is being committed, or that evidence of a crime would be found, but whether the probable cause is sufficiently fresh to presume that the items will remain on the premises. **People v Gillam**, 93 Mich App 548 (1979) and **People v Sundling**, 153 Mich App 277, 286-287 (1986) lv app den 428 Mich 887 (1987).

The standard of review regarding probable cause was discussed in the case of **People v Sloan**, 450 Mich 160 (1995). When reviewing the Court's assessment of probable cause to search, the court looked to the **Russo**, *supra* case. In **Russo** the court held that the standard requires the reviewing court to ask whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. **Russo**, citing **Illinois v Gates**, 462 US 213, 236; 103 SCt 2317 (1983). A reviewing court may consider only those facts and circumstances that were presented to the magistrate. **Aguilar v Texas**, 378 US 108, 112, 84 SCt 1509, 1512 (1964).

The **Sloan** court further held:

> . . . [R]eviewing courts must ensure that the magistrate's decision is based on **actual facts--not merely the conclusions of the affiant. . . . This purpose cannot be achieved if the magistrate simply adopts unsupported conclusions of the affiant. Sloan**, *supra* at 168-169. (emphasis added)

The **Sloan** court further stated:

> [T]he United States Supreme Court has explicitly recognized that probable cause determinations must be based on facts and circumstances; **"Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."** [**Aguilar v Texas**, *supra* at 112, 84 SCt at 1512, quoting **Nothanson v United States**, 290 US 41, 47, 54 SCt 11, 13 (1933) (emphasis added in original)] **Sloan**, *supra* f. note 3. (emphasis added)

In the case at bench Mr. Goldston asserts that there was not probable cause presented in the affidavit on which to issue the search warrant. The trial court's decision should be affirmed.

As for the good faith issue, the Court of Appeals addressed the good faith exception to the exclusionary rule in **People v Timothy Allen David**, 119 Mich App 289; lv app den 417 Mich 858 (1983) stating:

> The people would have us go one step further and find that where the police act unconstitutionally, but in good faith, the exclusionary rule need not be applied.
>
> Such a holding would, in effect, remove the probable cause requirement from the Fourth Amendment. A "good-faith" exception to the excusionary rule would insulate the magistrate's decision to grant a search warrant from appellate review. In every case where a constitutionally infirm search warrant was issued, the prosecution could reasonably claim that the police acted in good faith. In effect, the constitutional language that all warrants be issued only on a showing of probable cause would become a nullity.
>
> Furthermore, adoption of a "good-faith" standard would remove the incentive for police officers to find out what sort of police conduct constitutes an unreasonable invasion of privacy. On a police force, efficiency in obtaining convictions is rewarded so recognition of a good-faith exception to the warrant requirement would encourage police officers to remain ignorant of the law in order to garner more evidence and obtain more convictions. The end result, increased illegal police activity, is the very

problem that the exclusionary rule is designed to avert. Id. 298.

In **United States v. Leon**, 468 U.S. 897, 82 L. Ed. 2d 677 (1984), the Supreme Court held that a good faith exception applies to the Fourth Amendment exclusionary rule in federal cases. 468 U.S. at 905. However, the **Leon** decision stated specific instances when the fruits of a constitutionally infirm search should be suppressed despite the good faith exception: (1) the warrant contained a knowing or reckless falsehood; (2) the issuing judge acted as a mere "rubber stamp" for the police; or (3) the warrant and affidavit, even after extending appropriate deference to the issuing judge's determination, did not establish probable cause or possessed a technical deficiency such that the executing officers cannot reasonably assume the warrant to be valid.

In the case at bench, the good faith exception to the exclusionary rule should not be applied for the judge acted as a mere "rubber stamp" for the police and the warrant and affidavit did not establish probable cause. Further, the officers could not have assumed it was valid a valid warrant for they could not even include a reason for why a man standing on a street corner would have some relation to an address in Inkster and that that address contained contraband associated to the man on the corner. The trial court's decision should be affirmed.

B. Michigan Has Not and Should Not Adopt The 'Good Faith' Exception to The Exclusionary Rule.

Michigan jurisprudence does not and has never recognized a 'good faith' exception to the exclusionary rule. Many cases decided after the release of **People v Leon**, 468 US 897; 104 S Ct 3405 (1984) do not endorse the 'good faith' exception: See **People v Hall**, 158 Mich App 194 (1987); **People v Tanis** 153 Mich App 806, 813 (1986); **People v Jackson**, 1980 Mich App 339 (1989); **People v Scherbine**, 192 Mich App 54 (1984); **People v Landt**, 192 Mich App 54 (1991); **People v Hill,** 192 Mich App 54 (1991); **People v Sundling**, 1980 Mich App 339 (1986); **People v Sellars**, 153 Mich App 22, 28 (1986). As the court in **Sellars**, supra, observed:

> As to the prosecution's assertion of the good faith exception enunciated in **US v Leon**, supra, it should be noted that **Leon** was decided on July 5, 1984, and **Scherbine** was not decided until December 28, 1984. We must concluded that it is the intent of the Michigan Supreme Court that the good faith exception is not applicable to state cases in Michigan. supra, p 136. [Cite to NW2d.]

Not until this case has this Court granted leave on this issue.

Perhaps the most compelling review of Michigan's jurisprudence with respect to the exclusionary rule is found in Judge Jansen's concurring opinion in **People v Hellis**, 211 Mich App 634 (1995). Her opinion states:

> '...It is well established that there is no good faith exception to the exclusionary rule in Michigan, and I would adhere to that precedent. Id at 651.

Judge Jansen's remarks were in response to Judge O'Connell's lead opinion wherein he attempted to adopt a good faith exception. After outlining the historical jurisprudence with respect to the exclusionary rule and her rejection of the good faith exception, Justice Jansen concludes:

> 'Judge O'Connell's attempt to distinguish **Hill** from the present case is a distinction without a difference and appears to be an attempt merely to diverge from the well established precedent in this state that there is no good faith exception to the exclusionary rule.'

In **David**, **Sundling**, **Tanis**, and **Jackson**, the police relied upon search warrants that were later found to be invalid. Yet, in all those cases, the Court of Appeals still held that it would not adopt a good-faith exception to the exclusionary rule despite the fact that there was no **primary police illegality**. Further, in **Hill**, the police first acted illegally because they did not have probable cause to arrest the defendant without a warrant. After arresting the defendant and searching him, the police were able to obtain a search warrant for the defendant's house. Because the initial arrest and search were illegal, the search warrant was invalid because probable cause to issue the warrant was based upon the illegal arrest and search. The Court of Appeals held that it would not recognize and apply a good faith exception to the search warrant requirement where the police acted on a search warrant they believed was valid. **Hill**, supra, p 56 [cite to NW2d]. In short, there is no precedent to establish a good faith exception to the exclusionary rule in Michigan and, as Judge Cavanaugh said in **David**, 'It is wrong as a matter of policy.' **David**, supra, p. 489 [cite to NW2d].

C. Michigan's Exclusionary Rule.

For over 80 years, Michigan jurisprudence has recognized that a violation of a defendant's constitutional rights against unlawful searches and seizures must result in the exclusion from trial of evidence so obtained. See **People v Marxhausen**, 204

Mich 559; 171 NW 557 (1919). The **Marxhausen** case recognized that if evidence illegally obtained can be used in evidence against a citizen accused of an offense, the 'protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution.' Id, 571 [citing **US v Weeks**, 232 US 383 (1914)].

The exclusionary rule is a judicially created rule. In fact, the **David** court describes it as a judicially created means of effectuating Fourth Amendment rights. **David**, *supra*, p 294. Further, the majority in **Leon**, *supra*, recognizes that the exclusionary rule is a judicially created remedy rather than a personal constitutional right of the party aggrieved. **Leon**, *supra*, p 906.

However, contrary to the assertion in **Leon**, the purpose of the Michigan exclusionary rule is not merely to deter police misconduct, although that is clearly one of its goals. Instead, the broader purpose of the exclusionary rule under Michigan jurisprudence is to 'deter violations of the Fourth Amendment and promote judicial integrity so that a court is not a party to the use of illegally seized evidence.' **David**, *supra*, p 294. The Court of Appeals in **People v Sundling**, 153 Mich App 277 (1986), described the purpose of this judge-made exclusionary rule as follows:

> Our Supreme Court adopted the exclusionary rule as a **remedy** for violations of the Michigan constitutional right to be free from unreasonable searches and seizures long before such remedy was deemed to be required under the federal constitution (citation omitted). We maintain that its existence in its present form is a necessary ingredient to the preservation of the right under the Michigan Constitution to be free from unreasonable **government** intrusions. Therefore, we decline to follow **Leon**.' Id, p. 315 [cite to NW2d] (Emphasis added).

In **People v Martin**, 94 Mich App 649 (1980), the exclusionary rule was adopted to effectuate the Fourth Amendment's prohibition against unreasonable searches and seizures and to prevent illegally seized items and statements from being admitted into evidence. The rationale behind the exclusionary rule was stated most succinctly 80 years ago by this Court in **People v Halveksz**, 215 Mich 136 (1921), as follows:

> No power exists at common law to make a search and seizure without a warrant. **State v. Welch**, 79 Me. 99 (8 Atl. 348); **In re Swan**, 150 U.S. 637 (14 Sup. Ct. 225). The Constitution, article 2, § 10, of the State prohibits such a search and seizure.
>
> * * * * *
>
> 'It is the duty of courts, when attention is seasonably called to a violation of a constitutional right, in obtaining evidence in criminal prosecutions, **to vindicate the protection afforded individuals by the Constitution, and suppress the evidence**.'

Support for Michigan's broad based exclusionary rule is found in Justice Brennan's dissent in **People v Leon** wherein he makes the following relevant observations:

> A proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the [**Leon**] Court's deterrence rationale.' **Leon**, supra, p 930.
>
> * * * * *
>
> This reading of the Amendment implies that its prescriptions are directed solely at those government agents who may actually invade an individual's constitutionally protected privacy. The courts are not subject to any direct constitutional duty to exclude illegally obtained evidence, because the question of admissibility of such evidence is not addressed by the Amendment. This view of the scope of the Amendment relegates the judiciary to the periphery. Id, p 931-932.

* * * * *

A more direct answer may be supplied by recognizing that the Amendment, like other provisions of the Bill of Rights, restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that the constitutional rights are respected. Id, p 933.

* * * * *

Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single government action prohibited by the terms of the Amendment. Once that connection between the evidence gathering role of the police and the evidence admitting function of the court is acknowledged, the plausibility of the [**Leon**] Court's interpretation becomes more suspect. Id, p 933.

* * * * *

It is difficult to give any meaning at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police, but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements. The Amendment therefore must be read to condemn not only the initial constitutional invasion of privacy, which is done after all for the purpose of securing evidence, but also the subsequent use of any evidence so obtained. Id, p. 935.

Justice Stevenson's opinion in **Leon** describes the purpose of the exclusionary rule: 'to deter-compel respect for the constitutional guaranty in the only effectively available way, by removing the incentive to disregard it.' (Cite omitted.) If police cannot use evidence obtained through warrants issued on less than probable cause, they have less incentive to seek those warrants and magistrates have less incentive to issue them. Id, p. 974. Clearly, the deterrent is a judicial as well as a police one. Further, it **protects** constitutional rights and **vindicates** violations thereof. It promotes judicial integrity by precluding the use at trial of evidence wrongfully obtained.

**Leon** is based on the faulty premise that the exclusionary rule was designed to merely deter police misconduct. When the purpose of the exclusionary rule is misidentified by limiting it to deterrence of police misconduct, the good faith exception can easily be accept . The **Leon** decision portends that the only goal of the exclusionary rule is to deter police misconduct, but this has never been the sole purpose of the exclusionary rule, especially in Michigan. Instead, the purpose of the Michigan exclusionary rule is much broader, i.e., the protection and vindication of violations of citizens' constitutional rights, whether committed by the police or the judiciary.

How can you protect constitutional rights when you allow the admittance at trial of evidence seized in violation of those rights? Whether or not the police acted reasonably or in good faith in the execution of an invalid search or arrest warrant, the violation of the constitutional rights still exists. Focusing solely on police misconduct or the lack thereof misses the true purpose of the exclusionary rule. Just because the police may not act improperly in the execution of an invalid search or arrest warrant does not make the deprivation of constitutional rights any less severe. **It is the fact that the warrant was issued at all** that is the constitutionally impermissible conduct which leads to the seizure of evidence that must ultimately be suppressed.

When an invalid search or arrest warrant has been issued by a court, application of the exclusionary rule precludes the use of the evidence and vindicates the violation of the constitutional rights that occurred upon its issuance in the first place. Why should we ignore the constitutional transgression by the issuing magistrate and permit the use of the seized evidence at trial just because the police officers acted

reasonably (i.e., in good faith) in the execution of the warrant? The police officer's good faith reliance upon the validity of the warrant does not make it any less invalid. The Fourth Amendment forces the government - not just the police officer - to make sure it acts consistent with its citizens' constitutional rights. To ignore the sins of the magistrate because the officer acted in good faith reduces the protection of the Fourth Amendment to mere words.

While the federal courts may choose to identify and limit the purpose of the federal exclusionary rule to a mere deterrence of police misconduct, Michigan need not follow the precedent. Michigan is not compelled by any constitutional rule or judicial pronouncement to blindly accept and limit the purpose of its exclusionary rule, and it has not ever done so.

The federal good faith exception is a federal judge-made rule adopting an exception to the federal judge-made exclusionary rule.

At the state and federal level, the exclusionary rule was adopted by the courts to add teeth to the enforcement of the constitutional requirements. The exclusionary rule is not a constitutional right or rule derived from the Constitution, but instead a judicially proclaimed remedy. As such, Michigan courts may proclaim a broader exclusionary rule than the federal courts.

Maintaining Michigan's present exclusionary rule and not adopting the 'good faith' exception is not an attempt to expand the constitutional rights afforded to Michigan citizens under our state Constitution as compared to those available under the federal Constitution. The exclusionary rule being a judge-made rule, Michigan is free to adopt a more demanding version of the exclusionary rule. In fact, as stated in

**Sundling**, our Supreme Court adopted the exclusionary rule as a remedy for violations of the Michigan constitutional right to be free from unreasonable searches and seizures long before such remedy was required under the federal Constitution. The United States Supreme Court did not impose an exclusionary rule upon the states until its ruling **Mapp v Ohio**, 367 US 634 (1961). Therefore, there can exist real differences between the federal exclusionary rule and the Michigan exclusionary rule, and Michigan is not compelled to adopt a good faith exception to the exclusionary rule.

More importantly, Michigan is not duty bound to adopt **Leon**'s suggestion that the sole purpose of the exclusionary rule is to deter police misconduct. Under Michigan jurisprudence, the Michigan courts are free to determine that its exclusionary rule precludes evidence not only obtained by primary police illegality but also secondary police illegality (i.e., police acting upon what they believe to be a valid warrant, which is in fact invalid). As Judge Jansen stated in her opinion in **Hellis**, this is, 'simply a distinction without difference in Michigan jurisprudence.'

Michigan courts are free to choose to provide greater protection to its citizens in preserving their constitutional rights. To do so, Michigan is free to create its own unique version of its judge-made exclusionary rule that does not recognize a good faith exception. By the same token, Michigan courts are free to recognize a good faith exception to its exclusionary rule. For good reason, it has not and should not.

D. Just Say No to 'Good Faith'.

Since Michigan can set its own standards with respect to the scope of its exclusionary rule and since it is not compelled to accept the 'good faith' exception set

forth in **Leon**, the question still remains, should it. The answer is a resounding no. The 'good faith' exception would create a presumption that, whenever a citizen is arrested with an invalid warrant, any evidence obtained against him is admissible because the police did not know the warrant was invalid. If this were the rule, what motivation would the courts have to issue proper warrants? How are we to promote judicial integrity if there is no penalty for disregarding the rules? If the courts can use illegally obtained evidence against a defendant just because the police acted reasonably, the defendant's protection under the United States and Michigan Constitutions would not be realized.

Whether the officers were acting in good faith or not is irrelevant where the arrest itself is unlawful. The arrest is unlawful where a warrant is invalid. The warrant is invalid where it is issued contrary to the requirement that warrants be supported by probable cause. What gets lost in the **Leon** analysis is that the little piece of paper (i.e., a search warrant) and what is required legally to get one (i.e., probable cause) are very important to maintaining the protections afforded by the United States and Michigan Constitutions. It is important to remember that it does not make the seizure of the evidence any less illegal just because the officers acted in good faith. If the seizure was based upon the failure to adhere to the constitutional requirements that the warrants be based upon probable cause, then the defendant's rights are no less violated, and the evidence should be excluded.

Where the judicial misconduct goes to the heart of the constitutional rights being protected (i.e., no arrest warrant shall be issued without probable cause being established), what is the sanction under a good faith analysis? In this case the errors

in the affidavit and warrant were: 1) failing to connect the place to be searched with Mr. Goldston, 2) failing to state why the police believed they would find in that residence 'further fruits and instrumentalities of his crime and 3) failing to state on what date they saw Mr. Goldston on the corner. Thus there was an utter failure of the affidavit requirement and, therefore, the magistrate had nothing from which to make a probable cause determination. There was no attempt whatsoever to meet the constitutional requirements. The prosecutor argues that the officers allegedly knew nothing of these failures, and the evidence should be admitted even though there was no probable cause. Under this argument, what is the Defendant's remedy for the violation of his constitutional rights? If there is no harm in issuing a warrant without probable cause, why require it? Adopting 'good faith' in Michigan will allow the exception to swallow the rule that the Defendant is entitled to have a search warrant based upon some basic showing in an affidavit to the court that he has done something to permit the search of a dwelling he is associated with. The warrant itself is the safe ground. It is the invalid use of the evidence obtained from a defective warrant that denies the Defendant the very constitutional rights that were intended to be protected. As Justice Brennan states in his dissent, 'The court's view that it is consistent with our Constitution to adopt a rule that it is presumptively reasonable to rely on a defective warrant is the product of constitutional amnesia.'

The good faith analysis asks the question, 'If the officer was told to go search the house with a warrant without knowledge of its invalidity, how did the officer do anything wrong'? The analysis under such circumstance should be, 'What are we going to do about the fact that the officer was wrongfully told to go search the house?'

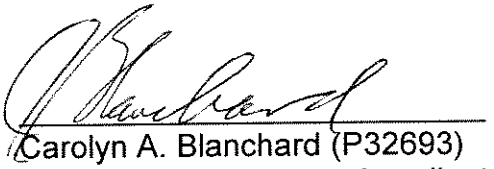
The **Leon** good faith analysis suffers from myopia. Wearing the blinders of the **Leon** 'limited-purpose' analysis of the exclusionary rule leads to the false conclusion that it is unnecessary to apply the exclusionary rule when the officers act is good faith. Notwithstanding an officer's good faith, the exclusionary rule must function to vindicate violations of the Michigan Constitutional rights and the Fourth Amendment rights which led to the very issuance of the invalid warrant that the officers acted in good faith to execute. The vindication comes in the form of exclusion of the evidence so obtained. The Michigan exclusionary rule is that reflexive.

In short, if you obtain an arrest or search warrant without adherence to the legal requirements necessary for its issuance, any evidence ultimately obtained (whether through police misconduct or not) must be suppressed. This application of the exclusionary rule in Michigan deters not only police misconduct and vindicates Fourth Amendment violations, it maintains the integrity of the judiciary by precluding the use at trial of evidence obtained in violation of constitutional rights. Therefore, it is a mistake to merely focus on the conduct of the officers when deciding when to apply the exclusionary rule. How can you protect the Fourth Amendment rights of a defendant when you permit the admission at trial of evidence that was unreasonably seized pursuant to an invalid warrant even though the officers acted reasonably? You cannot. Good faith has been and should continue to be rejected by the courts of this State.

## RELIEF

Wherefore for all these reasons, Defendant-Appellee Glenn Goldston respectfully requests that this Honorable Court affirm the trial court's factual finding of no probable cause to issue the search warrant and the suppression of the evidence found pursuant to that search.

Respectfully submitted,



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